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Supreme Court, U.S.
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No. _____

In the

Supreme Court of the United States

October Term, 1997

EDWARD COMENOUT, JR. and JOHN AND JANE DOES, 1-10 INCLUSIVE,

Petitioners,

v.

STATE OF WASHINGTON, DEPARTMENT OF COMMUNITY, DEVELOPMENT AND CITY OF PUYALLUP, A MUNICIPAL CORPORATION

Respondents.

Petition for Writ of Certiorari to the Washington State Supreme Court

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PETITION FOR WRIT OF CERTIORARI

DOUGLAS D. SULKOSKY
Attorney for Petitioner
Edward Comenout, Jr.
5631 Tacoma Mall Blvd.
Tacoma, WA 98409
(253)473-5570

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QUESTIONS PRESENTED

1. Whether or not the State of Washington has the jurisdiction to enforce the State's Fireworks Law, R.C.W. 70.77, on treaty Indians doing business on off-reservation Indian Trust Land.

2. Whether or not the City of Puyallup has juridiction to enforce it's Municipal Fireworks Law, Puyallup Municipal Code, §1620 on a treaty Indian doing business on off-reservation Indian Trust Land.

PARTIES TO THESE PROCEEDINGS

1. Edward Comenout, Jr., Petitioner
2. John and Jane Does, 1-10 inclusive, Petitioners.
3. State of Washington, Department of Community Development, Respondent.
4. City of Puyallup, Respondent.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Washington State Court of Appeals, Division II., dated May 9, 1997, below (App. B) was not reported. The decision of the Washington State Supreme Court, dated October 7, 1997, below (App. A) was not reported.

JURISDICTION

The decision of the Washington State Supreme Court below, (App. A) was entered October 7, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Treaty with Quinaults, Appendix C.

2. 18 U.S.C. §1162, Appendix D.

3. 25 U.S.C. §1321, Appendix E.

4. 25 U.S.C. §1322, Appendix F.

5. 25 U.S.C. §1326, Appendix G.

6. 25 U.S.C. §1360, Appendix H.

7. R.C.W. 35.02.250, Appendix I.

8. R.C.W. 37.12.060, Appendix J.

9. R.C.W. 70.77.270, Appendix K.

10. Puyallup Municipal Code, §1620.020, Appendix L.

11. Puyallup Municipal Code, §16.20.060, Appendix M.

12. Puyallup Municipal Code, §16.20.120, Appendix N.

STATEMENT OF THE CASE

Petitioners operate a fireworks stand located at 908 River Rd. E., within the city limits of Puyallup, Washington. The fireworks store is run by Edward Comenout, Jr., in conjunction with his brother, Robert Comenout. Edward Comenout, Jr. is a member of the Quinault Indian Tribe. The property upon which the Indian Country Store is located was purchased by Edward Comenout, Sr., the father of Petitioners, on or about September 10, 1928. The funds that were used to purchase the property were funds held in trust by the United States for the benefit of Edward Comenout, Sr. The warranty deed under which Edward Comenout, Sr. purchased the real property, placed the property in trust with the United States with a restriction on alienation and encumbrance without the consent of the Secretary of the Interior.

When Edward Comenout, Sr. died, his estate was probated by the Bureau of Indian Affairs. Edward Comenout, Jr. inherited one-half of the property, along with his mother, Anna Jack Comenout. Upon the death of Anna Jack Comenout, Edward Comenout, Jr. inherited the remaining one-half in equal shares, along with his brothers and sisters.

The Respondents, The State of Washington, Department of Community Development and the City of Puyallup, filed a Complaint for Declaratory and Injunctive Relief on June 30, 1992, in Pierce County Superior Court. The Respondents filed the First Amended Complaint for Declaratory and Injunctive Relief on July 8, 1992. These complaints sought declaratory and injunctive relief from the Pierce County Superior Court, seeking to enjoin Petitioners from selling fireworks to the general public. Respondents

sought the restraining orders based upon RCW 70.77 and §16.20 of the Puyallup Municipal Code.

On June 23, 1993, the Honorable Judge J. Kelley Arnold entered an Order Granting Declaratory and Injunctive Relief. He specifically found that Petitioners were subject to RCW 70.77, the "state fireworks law" and §16.20, the Puyallup "municipal fireworks law".

On February 10, 1995, Petitioners filed a Motion for Order Vacating Order Granting Declaratory and Injunctive Relief. The Honorable Vicky Hogan denied Petitioner's motion on March 13, 1995. From that order, Petitioners filed Notice of Appeal to the Washington State Supreme Court of Appeals, Division II. on March 29, 1995.

That during the pendency of that appeal the State of Washington, Department of Community and Development withdrew from the case.

On May 9, 1997, the Court of Appeals, Division II., determined that the trial court had jurisdiction to grant declaratory and injunctive relief and that Petitioner's real property was subject to the jurisdiction of the State and City of Puyallup with regards to the State's Fireworks Code, R.C.W. 70.77.270 and the City of Puyallup Fireworks Ordinance §16.2.

From that decision, Petitioner filed a Petition to Washington State Supreme Court on June 9, 1997. On October 7, 1997, the Washington State Supreme Court denied Petitioner's Petition for Review. It is from that denial that Petitioner now petitions the Court for Writ of Certiorari.

That the State of Washington, Department of Community Development, has since withdrawn from the case.

REASONS FOR GRANTING WRIT

I.

This case concerns the relationship between Native Americans, the State of Washington, and the City of Puyallup. The Court of Appeals, Division II, relied upon the recently decided case of State v. Cooper, 130 Wn 2d 770, 928 P. 2d 406 (1996), in finding that both the State of Washington and the City of Puyallup have jurisdiction to impose their statutes and ordinances upon the Indian trust lands of Petitioners. In the Cooper case, the Court determined that the State had criminal and civil jurisdiction over trust land outside the formal boundaries of a reservation. Cooper, Supra 776. The Court based it's decision upon the fact that Public Law 280 permitted state's to assume jurisdiction over Indian country. Washington assumed said jurisdiction with the passage of R.C.W. 37.12.010. Cooper,

Supra 773, 776.

The Cooper case did not deal with RCW 37.12.060. The statute states,

> "Nothing in this chapter...shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute, or with any regulation made pursuant thereto..."

The treaty with the Quinaults, (App. B), does not place a restriction upon the use of Indian trust land with regards to the sale and/or use of fireworks. Nor is there a Federal statute that restricts the sale of fireworks upon Indian trust land. Therefore, the State's attempt to impose its fireworks law, RCW 70.77, upon Petitioner's Indian trust property, is contrary to RCW 37.12.060. The Washington State Supreme Court has already determined that the state, or it's subdivisions, may not exercise police power to interfere with the use of restricted Indian lands. The Court stated in

Snohomish Cy. v. Seattle Disposal Co., 70 Wn 2d 668, 673, 425 P. 2d 22 (1967), that

> "Federal government has not intended to allow states or their governmental agencies to interfere with the use of restricted Indian lands by means of zoning ordinance."

The Court based its decision upon the limitations stated in RCW 37.12.060, and 28 U.S.C. §1360. Snohomish Cy. v. Seattle Disposal Co., Supra, 672. The State's imposition of the State's fireworks law, RCW 70.77, on Petitioner's property, is clearly in violation of the decision as stated in Snohomish Cy. v. Seattle Disposal Co., Supra. By imposing the statutes, the State is clearly interfering with Indian commercial activities, contrary to 25 U.S.C. §403B, and 25 U.S.C. §415. Federal statutes intended to promote Indian commercial activities.

The case for the City of Puyallup to exercise jurisdiction over Indian trust land is even more tenuous than

the State's. The State's claim to jurisdiction over Indian Country pursuant to Public Law 280, 18 U.S.C. §1162; 25 U.S.C. §1321-1326; 28 U.S.C. §1360. Public Law 280 did not authorize the states to delegate or authorize any subdivision, be it city or county, to exercise any jurisdiction over Indian lands. RCW 35.02.250, which authorizes a city or town to deal with the Federal government, did not grant cities or towns the jurisdiction to impose their ordinances upon Indian trust land. It only allows them to administer any property "when authorized to do so by the United States government..." The United States government has never authorized the City of Puyallup to exercise its jurisdiction over Indian Trust land.

It is important to remember that jurisdiction over Indian lands is obtained by the Federal government through treaties with the Indian nations. The Petitioner Edward

Comenout, Jr. is a member of the Quinault Tribe. The Quinault Tribe is a sovereign nation, separate and distinct from the State of Washington. State v. Courville, 36 Wn App 615 (1983). The treaty between the Quinaults and the United States is supreme over the Constitution and laws of the State of Washington. State v. Courville, Supra. Subjecting Petitioner's property to the ordinances of the City of Puyallup, in effect violates the spirit of the treaty in that city ordinances are being applied to a member of a sovereign nation.

The Court of Appeals in it's decision stated that Petitioner provided no authority for Petitioner's contention that the City of Puyallup lacks jurisdiction over Petitioner's real property. On the contrary, Petitioner presents the case of Snohomish Cy. v. Seattle Disposal Company, Supra, as support for their contention. Respondent has never provided

authority that a city may exercise jurisdiction over Indian Trust land.

In fact, the history has been that the City has never exercised jurisdiction over this Indian Trust land. In 1980, the City of Puyallup refused to extend police or fire assistance to Petitioner's property without a written request from Petitioners and the Quinault Indian Tribe.

CONCLUSION

The Court of Appeals, in relying upon State v. Cooper, Supra, has committed probable error. State v. Cooper, Supra, dealt with the imposition of criminal jurisdiction over all Indian land outside established Indian reservations. The Court should have relied, instead, upon Snohomish Cy. v. Seattle Disposal Co., Supra, in which the Court decided that the States may not exercise police power

to interfere with the use of restricted Indian lands.

The Court of Appeals committed probable error in determining that the City of Puyallup had jurisdiction to enforce its ordinances on Indian Trust land when cities and towns have never been granted this jurisdiction, either by Federal or State statute. The finding of the Court of Appeals substantially limits Petitioners' freedom to engage in commercial activities. The effect of the Court of Appeals' decision is contrary to the Congressional intent to promote Indian commercial activities. 25 U.S.C. §403B, and 25 U.S.C. §415.

This court should grant Petitioner's Petition for Writ of Certiorari reviewing the decision of the Washington State Supreme Court of Appeals, Division II., as upheld by the Washington State Supreme Court and find that neither the State nor the City of Puyallup has jurisdiction to enforce

their fireworks laws on Indian Trust Land owned by the Petitioner.

RESPECTFULLY SUBMITTED:

DOUGLAS D. SULKOSKY
Attorney for Petitioners

Appendix

APPENDIX A

All five members of Department II of the Court considered the matters set on its October 7, 1997, Motion Calendar, and unanimously agreed that the following order be entered. Therefore, Chief Justice Barbara Durham directed that this order be entered:

IT IS ORDERED:

That this Petition for Review is denied.

APPENDIX B

BRIDGEWATER, A.C.J.--We are asked to decide whether the superior court had jurisdiction to grant declaratory and injunctive relief prohibiting Edward Comenout Jr. and others from selling fireworks without a state license and a city permit from Comenout's Indian trust land, located outside the formal boundaries of an established Indian reservation. We affirm.

No. 19355-8-II

The Washington State Supreme Court in State v. Cooper, 130 Wn2d 770, 928 P.2d 406 (1996) decided an issue of exclusive federal jurisdiction identical to that raised by Comenout in his motion to vacate the order granting the declaratory judgment and injunction. The following propositions from Cooper are dispositive:

1. A determination of whether the state has

jurisdiction under RCW 37.12.010 over particular Indian lands presents a question of state law. 130 Wn.2d at 774, 779.

2. The case of State v. Sohappy, 110 Wn.2d 907, 757 P.2d 509 (1988) does not stand for the proposition that a "reservation" includes all Indian lands outside the formal boundaries of established reservations, and, specifically, the term "reservation" does not include lands held in trust for Indians outside the formal boundaries of an established reservation. Cooper, 130 Wn.2d at 777-78.

3. The state has jurisdiction over trust land outside the formal boundaries of an established Indian reservation. We hold that the trial court had jurisdiction to grant the declaratory and injunctive relief.

Comenout's reliance on United States v. Azure, 801 F.2d 336 (8th Cir. 1986) and Langley v. Ryder, 602 F.Supp.

335 (W.D. La. 1985) is misplaced. In both cases, defendants committed offenses enumerated in 18 U.S.C. § 1153. Azure, 801 F.2d at 338; Langley, 602 F. Supp. at 339. Under federal law, offenses enumerated in 18 U.S. C. § 1153 are preemptive of state jurisdiction. Because violation of a state's fireworks law is not one of § 1153's enumerated offenses, § 1153 does not operate here to preempt state jurisdiction. Likewise, Comenout's position that the superior court was without authority to enforce the City of Puyallup's fireworks ordinance is meritless. The Washington fireworks law has expressly delegated to municipalities the authority to adopt ordinances regulating the granting or denial of permits for the sale of fireworks. RCW 70.77.270. Comenout provides not authority otherwise.

We affirm.

A majority of the panel having determined that this

opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

APPENDIX C

TREATY WITH THE QUI-NAI-ELTS

WHEREAS a treaty was made and concluded on the Qui-nai-elt River, in the Territory of Washington, on the first day of July, one thousand eight hundred and fifty-five, and at the city of Olympia also in said Territory, on the twenty-fifth day of January, one thousand eight hundred and fifty-six, between Isaac I. Stevens, governor and superintendent of Indian affairs in the Territory aforesaid, on the part of the United States, and the hereinafter-named chiefs, headmen, and delegates of the different tribes and bands of the Qui-nai-elt and Quil-leh-ute Indians, on the part of said tribes and bands, and duly authorized thereto by them; which treaty is in the words and figures following, to wit:--

Articles of agreement and convention made and concluded by and between Isaac I. Stevens, governor and

superintendent of Indian-affairs, of the Territory of Washington, on the part of the United States, and the undersigned chiefs, headmen, and delegates of the different tribes and bands of the Qui-nai-elt and Quil-leh-ute Indians, on the part of said tribes and bands, and duly authorized thereto by them.

ARTICLE I. The said tribes and bands hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows: Commencing at a point on the Pacific coast, which is the southwest corner of the lands lately ceded by the Makah tribe of Indians to the United States, and running easterly with and along the southern boundary of the said Makah tribe to the middle of the coast range of mountains; thence southerly with said range of mountains to their intersection with the dividing

ridge between the Chehalis and Quinialt Rivers; thence westerly with said ridge to the Pacific coast; thence northerly along said coast to the place of beginning.

ARTICLE II. There shall, however, be reserved, for the use and occupation of the tribes and bands aforesaid, a tract or tracts of land sufficient for their wants within the Territory of Washington, to be selected by the President of the United States, and hereafter surveyed or locate and set apart for their exclusive use, and no white man shall be permitted to reside thereon without permission of the tribe and of the superintendent of Indian affairs or Indian agent. And the said tribes and bands agree of this treaty, or sooner if the means are furnished them. In the mean time it shall be lawful for them to reside upon any lands not in the actual claim and occupation of citizens of the United States, and upon any lands claimed or occupied, if with the permission

of the owner or claimant. If necessary for the public convenience, roads may be run through said reservation, on compensation being made for any damage sustained thereby.

ARTICLE III. The right of taking fish at all usual and accustomed grounds and stations is secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing the same; together with the privilege of hunting, gathering roots and berries, and pasturing their horses on all open and unclaimed lands. **Provided, however,** That they shall not take shell-fish from any beds staked or cultivated by citizens; and provided, also, that they shall alter all stallions not intended for breeding, and shall keep up and confine the stallions themselves.

ARTICLE IV. In consideration of the above cession, the United States agree to pay to the said tribes and bands

the sum of twenty-five thousand dollars, in the following manner, that is to say: For the first year after the ratification hereof, two thousand five hundred dollars; for the next two years, two thousand dollars each year; for the next three years, one thousand six hundred dollars each year, for the next four years, one thousand dollars each year; and for the next five years, seven hundred dollars each year. All of which sums of money shall be applied to the use and benefit of the said Indians under the directions of the President of the United States, who may from time to time determine at his discretion upon what beneficial objects to expend the same; and the superintendent of Indian affairs, or other proper officer, shall each year inform the President of the wishes of said Indians in respect thereto.

ARTICLE V. To enable the said Indians to remove to and settle upon such reservation as may be selected for

them by the President, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States further agree to pay the sum of two thousand five hundred dollars, to be laid out an expended under the direction of the President, and in such manner as he shall approve.

ARTICLE VI. The President may hereafter, when in his opinion the interests

of the Territory shall require, and the welfare of the said indians be promoted by it, remove them from said reservation or reservations to such other suitable place or places within said Territory as he may deem fit, on remunerating them for their improvements and the expenses of their removal, or may consolidate them with other friendly tribes or bands, in which latter case the annuities, payable to the consolidated tribes respectively, shall also be consolidated; and he may further, at his discretion, cause the whole or any portion of

the lands to be reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same regulations as are provided in the sixth article of the treaty of the Omabas, so far as the same may be applicable. Any substantial improvements heretofore made by any Indians, and which they shall be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President, and payment made accordingly therefor.

ARTICLE VII. The annuities of the aforesaid tribes and bands shall not be taken to pay the debts of individuals.

ARTICLE VIII. The said tribes and bands acknowledge their dependence on the government of the United States, ad promise to be friendly with all citizens thereof, and pledge themselves to commit no depredations on

the property of such citizens; and should any one or more of them violate this pledge, and the fact be satisfactorily proven before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the government out of their annuities. Nor will they make war on any other tribe except in self-defense, but will submit all matters of difference between them and other Indians to the government of the United States, or its agent, for decision, and abide thereby; and if any of the said Indians commit any depredations on any other Indians within the Territory, the same rule shall prevail as is prescribed in this article in cases of depredations against citizens. And the said tribes and bands agree not to shelter or conceal offenders against the laws of the United States, but to deliver them to the authorities for trial.

ARTICLE IX. The above tribes and bands are

desirous to exclude from their reservations the use of ardent spirits, and to prevent their people from drinking the same, and therefore it is provided, that any Indian belonging to said tribes, who is guilty of bringing liquor into said reservations, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her, for such time as the President may determine.

ARTICLE X. The United States further agree to establish at the general agency for the district of Puget Sound, within one year from the ratification hereof, and to support for a period of twenty years, an agricultural and industrial school, to be free to the children of the said tribes and bands in common with those of the other tribes of said district, and to provide the sail school with a suitable instructor or instructors, and also to provide a smithy and carpenter's shop, and furnish them with the necessary tools,

and to employ a blacksmith, carpenter, and farmer for the term of twenty years, to instruct the Indians in their respective occupations. And the United States further agree to employ a physician to reside at the said central agency, who shall furnish medicine and advice to their sick, and shall vaccinate them; the expenses of the said school, shops, employees, and medical attendance to be defrayed by the United States and not deducted from their annuities.

ARTICLE XI. The said tribes and bands agree to free all slaves held by them, and not to purchase or acquire others hereafter.

ARTICLE XII. The said tribes and bands finally agree not to trade at Vancouver's Island or elsewhere out of the dominions of the United States, nor shall foreign Indians be permitted to reside on their reservations without consent of the superintendent or agent.

ARTICLE XIII. This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

In testimony whereof, the said Issac I. Stevens, governor and superintendent of Indian affairs, and the undersigned chiefs, headmen, and delegates of the aforesaid tribes and bands of Indians, have hereunto set their hands and seals, at Olympia, January 25, 1856, and on the Qui-nai-elt River, July 1, 1855.

APPENDIX D

18 U.S.C. §1162 Definitions

(a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

State or Territory of	Indian country affected
Alaska.....	All Indian country within the State, except that on Annette Islands, the Metlakatla Indian community may exercise jurisdiction over offenses committed by Indians in the same manner in which such jurisdiction may be exercised by Indian tribes in Indian country over which State jurisdiction has not been

	extended.
California...	All Indian country within the State.
Minnesota....	all Indian country within the State, except the Red Lake Reservation.
Nebraska.....	All Indian country within the State.
Oregon.....	All Indian country within the State, except the Warm Springs Reservation.
Wisconsin....	All Indian country within the State.

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing on the control, licensing, or regulation thereof.

(c) The provision of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in the subsection (a) of this section as areas over which the several States have exclusive jurisdiction. (Added Aug. 15, 1953, ch 505, § 2, 67, Stat. 588; Aug. 24, 1954, ch 910, §1, 68 Stat. 795; Aug. 8, 1958, P.L. 85-615, § 1, 72 Stat. 545; Nov. 15, 1970, P.L. 91-523, §§ 1, 2, 84 Stat. 1358.)

APPENDIX E

25 U.S.C. § 1321 Definitions

(a) **Consent of United States; force and effect of criminal laws.** The consent of the United States is hereby given to any State not having jurisdiction over criminal offenses committed by or against Indians in the areas of Indian country situated within such State to assume, with the consent of the Indian tribe occupying the particular Indian country or part thereof which could be affected by such assumption, such measure of jurisdiction over any or all of such offenses committed within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over any such offense committed elsewhere within the State, and the criminal laws of such State shall have the same force and effect within such Indian country or part thereof as they have elsewhere within the State.

(b) **Alienation, encumbrance, taxation, and use of property; hunting, trapping, or fishing.** Nothing is this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded

under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.
(Apr. 11, 1968, P.L. 90-284, Title IV, §401, 82 Stat. 78.)

APPENDIX F

25 U.S.C. §1322 Definitions

(a) Consent of United States; force and effect of civil laws. The consent of the United States is hereby given to any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State fyi assume, with the consent of the tribe occupying the particular Indian country or part thereof which would be affected by such assumption, such measure of jurisdiction over any or all such civil causes of action arising within such Indian country or any party thereof as may be determined by such State to the same extent that such State has jurisdiction over other civil causes of action, ad those civil laws of such State that are of general application to private personas or private property shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

(b) Alienation, encumbrance, taxation, use, and probate of property. Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute, or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate

proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

(c) Force and effect of tribal ordinances or customs. Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

(Apr. 11, 1968, P.L. 90-284, Title IV, §402, 82 Stat. 79.)

APPENDIX G

25 U.S.C. §1326 Definitions

Special election

State jurisdiction acquired pursuant to this title [25 USCS §§ 1321 et seq.] with respect to criminal offenses or civil causes of action, or with respect to both, shall be applicable in Indian country only where the enrolled Indians within the affected area of such Indian country accept such jurisdiction by a majority vote of the adult Indians voting at a special election held for that purpose. The Secretary of the Interior shall call such special election under such rules and regulations as he may prescribe, when requested to do so by the tribal council or other governing body, or by 20 per centum of such enrolled adults.
(April 11, 1968, P.L. 90-284, Title IV, § 406, 82 Stat. 80.)

APPENDIX H

25 U.S.C. §1360 Definitions

State civil jurisdiction in actions to which Indians are parties

(a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians ar parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other causes of action, and those civil laws of such State that are of general application to probate persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:

State of	Indian country affected
Alaska.....	All Indian country within the State
California..	All Indian country within the State
Minnesota...	All Indian country within the State, except the Red Lake Reservation
Nebraska....	All Indian country within the State
Oregon.....	All Indian country within the State, except the Warm Springs Reservation
Wisconsin...	All Indian country within the State

(b) Nothing is this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian

tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

(Aug. 15, 1953, ch 505, §4, 67 Stat. 589; Aug. 24, 2954, ch 910, §2, 678 Stat. 795; Aug. 8, 1958, P.L. 85-615, §2, 72 Stat. 545; Nov. 6, 1978, P.L. 95-598, Title II, § 239, 92 Stat. 2668; July 10, 1984, P.L. 93-353, title I, §110, 98 Stat. 342.)

APPENDIX I

R.C.W. 35.02.250 Corporate powers in dealings with federal government

Any city or town incorporated as provided in this chapter shall, in addition to all other powers, duties and benefits of a city or town of the same type or class, be authorized to purchase, acquire, lease, or administer any property, real or personal, or property rights and improvements thereon owned by the federal government on such terms and conditions as may be mutually agreed upon, when authorized to do so by the United States government, and thereafter to sell, transfer, exchange, lease, or otherwise dispose of any such property, and to execute contracts with the federal government with respect to supplying water and for other utility services.

Formerly § 35.04.170, enacted by Laws 1965, ch. 7, § 35.04.170, eff. March 5, 1965. Recodified as § 35. 02.250 and amended by Laws 1986, ch. 234, §§ 28, 37, eff. April 3, 1986.

APPENDIX J

R.C.W. 37.12.060 Chapter limited in application

Nothing is this chapter shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights and tidelands, belonging to any Indian or any Indian tribe, band, or community that his held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the state to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, statute, or executive order with respect to Indian land grants, hunting, trapping, or fishing or the control, licensing, or regulation thereof.

Enacted by Laws 1957, ch. 240, § 6. Amended by Laws 1963, ch. 36, §4.

APPENDIX K

R.C.W. 70.77.270 **Governing body to grant permits-State-wide standards-Liability insurance**

(1) The governing body of a city or county shall grant an application for a permit under RCW 70.77.260(1) if the application meets the standards under this chapter, and the ordinances of the city or county.

(2) The director of community, trade, and economic development[1] through the director of fire protection shall prescribe uniform, state-wide standards for retail fireworks stands. All cities and counties which allow retail fireworks sales shall comply with these standards.

(3) No retail fireworks permit may be issued to any applicant unless the retail fireworks stand is covered by a liability insurance policy with coverage of not less than fifty thousand dollars and five hundred thousand dollars for bodily injury liability for each person and occurrence, respectively, and not less than fifty thousand dollars for property damage liability for each occurrence, unless such insurance is not readily available from at least three approved insurance companies. If insurance in this amount is not offered, each fireworks permit shall be covered by a liability insurance policy in the maximum amount offered by a least three

---

[1]**Reviser's note:** Functions of the director of community, trade, and economic development relating to fire protection were transferred to the chief of the Washington state patrol by 1995 c 369.

different approved insurance companies.

No wholesaler may knowingly sell or supply fireworks to any retail fireworks stand unless the wholesaler determines that the retail fireworks stand is covered by liability insurance in the same amount as provided in this subsection.

Amended by Laws 1994, ch. 133, § 6, eff. March 28 1994; Laws 1995, ch. 61, § 14, eff. April 17, 1995.

APPENDIX L

Puyallup Municipal Code §16.20.020 Permit required for sales--Application. It is unlawful for any person to offer for sale at retain or wholesale, without having first obtained a permit to do so. application for such permit shall be made in writing to the chief no later that June 15th of the year for which permit is sought on forms providing for that purpose. Permit fees, inspection, and plan review charges shall be charged as required by resolution. The chief may place reasonable conditions on any permit issued. A permit shall not be issued unless the applicant is the holder of a valid license issued by the State Fire Marshal to do the particular act or acts described in the permit as required by chapter 70.77 RAW, and unless the applicant files with the chief a certificate of insurance in the minimum amount of $500,000.00 combined single limit covering bodily injury liability, property damage liability, including products liability, premises liability and contractual liability, with the applicant named as insured thereon and which also shall name, as additional insured parties, the city, its officers and employees acting in their capacity as agents of the city. (Ord. 2314 §1(part), 1992.).

APPENDIX M

Puyallup Municipal Code §16.20.060 Sale and discharge of fireworks.

(a) Except as permitted by this chapter and state law, it is unlawful to possess, discharge or sell at wholesale or retail any fireworks other than common fireworks. No common fireworks shall be sold other than common fireworks. No common fireworks shall be sold or offered for sale at retail within the city except from twelve noon on the twenty-eighth day of June to nine p.m. on the fourth day of July of each year; provided, however, that toy pistols, toy canes, toy guns or other similar devices, in which paper caps containing no more than twenty-five hundredths grain of explosive compound for each cap used, may be sold at all times. No person shall sell any common fireworks to a consumer or user thereof under the age of 16 years and other than at a fixed place of business or a retailer for which a permit has been issued. The transfer of fireworks ownership, whether by sale at wholesale or retail, by gift or by other means of conveyance of title, or the valid permit at the time of such transfer where a permit is required by this chapter, is prohibited. No common fireworks may be sold between the hours of 11:00 p.m. and 9:00 a.m.

(b) it is unlawful for a person to ignite, discharges, use or explode any common fireworks except between the hours of 9:00 a.m. and 11:00 p.m. on July 4th. (Ord. 2314 §1(part), 1992).

APPENDIX N

Puyallup Municipal Code 16.20.120 Violations--Penalty--Each day a separate, continuing offense. Any person violating any of the provisions or failing to comply with any of the mandatory requirements of this chapter is guilty of a misdemeanor. Any person convicted of a misdemeanor under the chapter shall be punished by a fine of not more than $500.00, or by imprisonment not to exceed 90 days, or by both find and imprisonment. A person is guilty of a separate offense for each day during any portion of which any violation of any provision of this chapter is committed, continued or permitted by any such person, and punishment shall be accordingly. (Ord. 2314 §1(part), 1992).

Supreme Court, U.S.
FILED
FEB 6 1998
CLERK

(2)

No. 97-1138

In The

Supreme Court of the United States

October Term, 1997

EDWARD COMENOUT, JR. and JOHN and JANE DOES, 1-10 INCLUSIVE,

Petitioners,

v.

STATE OF WASHINGTON, DEPARTMENT OF COMMUNITY DEVELOPMENT and CITY OF PUYALLUP, A MUNICIPAL CORPORATION,

Respondents.

On Petition For Writ Of Certiorari To The Washington State Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ANDREW G. COOLEY
Counsel of Record
KEATING, BUCKLIN & MCCORMACK
800 Fifth Avenue, Suite 4141
Seattle, Washington 98104
(206) 623-8861
Attorneys for Respondent City of Puyallup

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

50-PP

QUESTIONS PRESENTED

1. Whether this Court should accept review of a case where the primary conflict asserted by petitioner arises between the Washington State Supreme Court and the Washington State Appellate Court, and petitioner does not otherwise claim conflict between federal and state courts or intra state.

2. Should this Court accept review of a case which includes analysis of Indian trust property attributes and jurisdiction of Washington State over criminal acts on such land where the case below followed well-settled precedents of the federal courts, including this Court.

LIST OF PARTIES

The respondent, City of Puyallup, joins in petitioners' Statement of Parties to these proceedings.

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STATEMENT OF THE CASE

This case involves the application of Washington State laws governing fireworks to a parcel of land in the City of Puyallup, Washington. Petitioner omits certain facts about the nature of the parcel of land at issue.

Petitioner, Edward Comenout, is one of 11 beneficial owners of a piece of property. App. p. 15. The property is held in trust by the United States for the 11 beneficial owners. This is not tribal trust property. It is not allotted property. App. p. 1. The parcel has never been used by any tribe. It has not even been used exclusively by Indians. Non-Indians have leased it for a used car lot. *Mattheson v. Kinnear*, 393 F.Supp. 1025 (W.D. Wash. 1975).[1]

Edward Comenout is the only petitioner who claims membership in a recognized tribe, the Quinaults. His brother, Robert Comenout, claims membership in the Snoqualmie Indian Tribe, which is not recognized. App. p. 2; *Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs*, 53 Fed. Reg. 52892-02 (1988). The record does not indicate whether any of the other 11 owners claim tribal rights or not.

---

[1] *Mattheson* represents the beginning of a 20-year struggle by the petitioner to avoid state jurisdiction over this parcel of property. In each case the petitioner has sought refuge in his status as a descendant of Indians, and at each stage he has lost. *Comenout v. Washington*, 727 F.2d 574 (9th Cir. 1983); *Comenout v. City of Puyallup*, Western District of Washington, CV-94-5324 RJB (1994); *Comenout v. City of Puyallup*, 9th Cir. Ct. of App. No. 94-35904 (1995); *State v. Comenout*, Western District of Washington, No. C92-5367 (1992), *appeal dismissed*, 9th Cir. Ct. of App. No. 92-36830 and No. 92-36832 (1992).

The property is located within the City of Puyallup. Beginning in 1992, the petitioner was the subject of a state court injunction preventing him from selling illegal fireworks. App. p. 3. In 1994, the petitioner sold illegal fireworks to school children in violation of the injunction. App. p. 6, App. p. 8. Petitioner was found in contempt. App. p. 10. Petitioner does not challenge the operative facts of this case, only the jurisdiction of the state court to enjoin these acts.

REASONS FOR DENYING THE PETITION

A. Petitioner fails to show a conflict between state courts or between Washington State and the federal courts.

Petitioner's Writ is premised upon a claim that two cases of the Washington Supreme Court conflict. Petitioner's Writ, p. 12. A conflict between two decisions of the same court of last resort does not present an appropriate reason for review in this Court. Rule 10(b). A claim that a state intermediate Court of Appeals relied upon the wrong one of two decisions of the state court of last resort similarly does not present a recognized basis for granting a writ. *Id.*

B. The federal questions decided below follow well-established precedent.

An unarticulated ground for this petition is that the case below addressed federal law and did so incorrectly. At various stages of this litigation, the petitioner has claimed his property is "Indian country" or an "Indian

reservation." If so, the petitioner reasons, the state and its municipal subdivisions have no jurisdiction. Indeed, the present petition is premised upon the unsupported syllogism that since the petitioner, Edward Comenout, is a member of the Quinault Tribe, and the Quinault Tribe is party to a federal treaty, this parcel of land is an Indian reservation. Petition, pps. 11-12.

The claim by petitioner that the parcel of property is a sovereign Indian Nation has been decided against the petitioner by following well-established precedent, some coming from this Court, and all utterly ignored in the petition.

Following this Court's decision in *Donnelly v. United States*, 228 U.S. 243, 57 L.Ed. 820, 33 S.Ct. 449 (1913), Congress codified the definition of an Indian reservation in the Indian country statute, 18 U.S.C. § 1151. By its express terms, Indian country is limited to reservations [Section 1151(a)]; dependent Indian communities [Section 1151(b)]; and all Indian allotments [Section 1151(c)].

This land is not part of a reservation. Nor is the land properly characterized as a dependent Indian community under any analysis of its functional qualities as a de facto reservation. *Alyeska Pipeline Service Co. v. Kluti Kaah Native Village of Copper Center*, 101 F.3d 610, 612-613 (9th Cir. 1996); *Blatchford v. Sullivan*, 904 F.2d 542 (10th Cir. 1990), *cert. denied*, 111 S.Ct. 699, 498 U.S. 1035, 112 L.Ed.2d 689 (1991). Finally, this land is not allotted. App. p. 1.[2]

---

[2] Allotment is a term of art. Cohen, *Handbook of Federal Indian Law*, p. 615 (1982). It defines the process of allotting tribal

Tribal sovereign immunity does not extend to crimes committed by Indians on land outside of the sovereign reservation. *Puyallup Tribe v. Washington Game Dept.*, 433 U.S. 165, 171, 53 L.Ed.2d 667, 97 S.Ct. 2616 (1976).

CONCLUSION

Petitioner has advanced no compelling reason for this Court to grant the writ. There is no conflict between decisions. There is no important federal question decided with debatable reason by the state court. For these reasons, the petition should be denied.

Respectfully submitted,

ANDREW G. COOLEY
Counsel of Record
Attorneys for Respondent
City of Puyallup
KEATING, BUCKLIN & MCCORMACK
800 Fifth Avenue, Suite 4141
Seattle, Washington 98104
(206) 623-8861

---

lands by conveyance to the United States in trust for the tribal beneficiaries. *Id.* at 616. That is not the case here. Indeed, even the Washington state case relied upon by the petitioner, *Snohomish Cy. v. Seattle Disposal Co.*, 70 Wn.2d 668, 425 P.2d 22 (1967), addressed the significance of allotted land held in trust for a particular tribal nation. *Id.* at 671, 425 P.2d at 25.

App. 1

APPENDIX

TITLE STATUS REPORT

DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS

ALLOTMENT OR TRACT NUMBER	RESERVATION CODE	RESERVATION NAME	NAME OF ORIGINAL ALLOTTEE	PAGE NO.
1027	130	WESTERN WASHINGTON PUBLIC DOMAIN	PURCHASED LAND - NOT ALLOTTED	1

ALLOTMENT AND AMENDATORY ACTS	ALLOTMENT SCHEDULE APPROVED	PATENT		NUMBER	DATE
		TRUST	---		
		RESTRICTED FEE	---		

DESCRIPTION OF REALTY INTERESTS CURRENTLY UNDER JURISDICTION OF B I A

SECTION	TOWNSHIP	RANGE	MER	COUNTY	STATE	NE	NW	SW	SE	ACRES	REMARKS
21	20N	4E	WM	PIERCE	WASH			O		1.78	PT L1+2 GEORGE O KELLYS 2ND SUBD OF DLC 39
										1.78	TOTAL

LEGAL (NARRATIVE) DESCRIPTION: Those portions of the following described tract of land lying south of the northerly line of Washington State Primary Highway No. 5 in section 21, Township 20 North, Range 4 East, Willamette Meridian, Pierce County, Washington; Commencing at a point 265.14 feet north of the southeast corner of Lot 2 as the same is known and designated upon a certain plat entitled "George O. Kelly's 2nd Subdivision of part of the B. F. Wright D. L. C. No. 39, in sections 20, 21, 28, 29, Township 20 North, Range 4 East, Willamette Meridian" filed for record in the office of the Auditor of Pierce County, July 10th, 1903; thence running west 356.33 feet to a stake; thence north 345.47 feet to a stake on the bank of the Puyallup River; thence easterly along the meander line of said River 383.07 feet to the east line of Lot 1 of said plat; thence south along the east line of said subdivision 204.76 feet to the point of beginning, containing 1.78 acres, more or less.

BEST AVAILABLE COPY

THE HONORABLE ROBERT J. BRYAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

EDWARD COMENOUT JR. and ROBERT COMENOUT SR. d/b/a/ INDIAN COUNTRY STORE, Plaintiff's, v. CITY OF PUYALLUP, A MUNICIPAL CORPORATION, defendant.	NO. C94-5324 RJB AFFIDAVIT OF ROBERT COMENOUT SR.

STATE OF WASHINGTON)
) SS
County of Snohomish)

COMES NOW ROBERT R. COMENOUT SR., Who first being sworn on oath, DEPOSES AND SAYS THAT;

I am Robert R. Comenout Sr., one of the Defendants herein, currently residing on the Tulalip Indian Reservation, who claim to be successors in interest to the Snoqualmie Tribe, I am aboriginal S'DOK'WAL'BIX, present day Snoqualmie, I am currently enrolled in the SNOQUALMIE TRIBAL ORGANIZATION, ROLL NO. 245, THE SNOQUALMIE TRIBE, ROLL NO. 245, and THE

TULALIP TRIBES OF WASHINGTON, TRIBAL ROLL NO.# 2597.

I have been in Tribal Relations throughout my life-time, or since March 19, 1931, and have recieved [sic] tribal benefits since that time. Indian health, I was in Cushman Indian Hospital in 1939, Indian Education, Chemawa Indian School 1947-1948.

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR PIERCE COUNTY

THE STATE OF WASHINGTON; DEPARTMENT OF COMMUNITY DEVELOPMENT; and THE CITY OF PUYALLUP, Plaintiffs, v. EDWARD COMENOUT, JR.; ROBERT COMENOUT, SR.; and JOHN AND JANE DOES 1-9 inclusive, Defendants.	NO. 92-2-06381-1 ORDER GRANTING DECLARATORY AND INJUNCTIVE RELIEF

This matter came before the Court the 22nd day of June, 1993, on Plaintiff's motion for declaratory and injunctive relief. The Plaintiffs appeared by and through their attorneys of record and Defendants appeared pro se.

The Court reviewed the files and the records, the affidavits of the parties, and considered the oral argument of the parties. The following documents were offered and considered at the time of hearing: Plaintiffs' Memorandum of Points and Authorities in Support of Motion for Declaratory Relief; Affidavit of Richard F. Carman; Letter dated September 12, 1984 addressed to Robert R Comenout, Sr., from Bureau of Indian Affairs; and Memorandum from Stanley Speaks, Area Director, Portland Branch of Real Property Management.

Based on the files, records, the foregoing documents, and the arguments of the parties the Court rendered its oral decision and made following conclusions of law:

1. Commercial fireworks activities conducted on the property located at 908 River Road East, Puyallup, Pierce County, Washington, at the business known as the Indian Country Store are subject to ch. 70.77 RCW, "State Fireworks Law," and ch. 16.20 of the Puyallup Municipal Code, "Fireworks."

2. The United States District Court ruling that the State of Washington has jurisdiction to enforce state laws as to activities conducted on this parcel is controlling. *Matheson v. Kinnear*, 393 F. Supp. 1025 (W.D. Wash. 1975).

Consistent with its oral decision and conclusions of law, the Court enters judgment as follows:

1. That in this and future years, Edward Comenout, Jr., and Robert Comenout, Sr., Defendants herein, their agents, servants and employees and those acting in concert with them are prohibited and permanently enjoined from engaging in any acts violating ch. 70.77 RCW, "State Fireworks Law," and ch. 16.20 Puyallup Municipal Code, "Fireworks," in their commercial activities with respect to common and special fireworks on the subject property.

No bond is required, pursuant to RCW 4.92.080.

DONE IN OPEN COURT THIS 23rd day of June, 1993.

/s/ J. Kelley Arnold
HONORABLE
J. KELLEY ARNOLD
Judge of the Superior Court

Presented by:
CITY OF PUYALLUP

/s/ Robin S. Jenkinson
ROBIN S. JENKINSON WSBA No. 10853
City Attorney
Attorney for Plaintiff
City of Puyallup

/s/ Derek A. Mann
DEREK A. MANN, WSBA No. 20194
Assistant Attorney General
Attorney for Plaintiffs
State of Washington and Department
of Community Development

APPROVED AS TO FORM AND
NOTICE OF PRESENTMENT WAIVED:

_____
EDWARD COMENOUT, JR.

_____
ROBERT COMENOUT, SR.

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR PIERCE COUNTY

THE CITY OF PUYALLUP, a municipal corporation, Plaintiff, vs. EDWARD COMENOUT, JR., AND JOHN AND JANE DOES 1 - 10, INCLUSIVE, Defendants.	)	No. 92-2-06381-1 AFFIDAVIT OF RICHARD F. CARMAN

STATE OF WASHINGTON)
COUNTY OF PIERCE) ss:

RICHARD F. CARMAN, being first duly sworn on oath, deposes and says:

1. I am the Fire Marshal for the City of Puyallup. My duties include the investigation of fires of suspicious origin and investigations of incidents of possession of illegal fireworks.

2. On June 2, 1994 at approximately 0950 hours, I responded to a request to investigate an incident at Maplewood Elementary School involving possession of illegal fireworks by juveniles.

3. As part of my investigation I interviewed Susan Hulbert, Principal of Maplewood Elementary School. Ms. Hulbert stated that one of her twelve-year old male students, had arrived at school on June 2, 1994 with "bottle rockets" in his pack.

4. Upon further investigation I discovered that on June 1, 1994, three juveniles rode their bikes to the Indian Country Store located at 908 River Road, Puyallup, Washington. Two of the juveniles entered the store and purchased a quantity of "bottle rockets".

5. After purchasing the "bottle rockets" they rode their bikes to DeCoursey Park in Puyallup and discharged a number of "bottle rockets" at the park.

6. On June 2, 1994 at Maplewood Elementary School the pack of the subject juvenile was kicked by another student and five "bottle rockets" fell from the pack. The "bottle rockets" were spotted by the teacher who in turn notified the Principal who notified the Puyallup Fire Department.

7. In a separate incident, on June 6, 1994 at approximately 1600 hours I personally observed the ignition of firecrackers in the middle of a residential street located at SW 13th Street and 7th Avenue, Puyallup, Washington.

8. Upon further investigation it was discovered that one of the juveniles was in possession of a pack of skyrockets containing 12 rockets. The juvenile stated that he had purchased the fireworks at the Indian Country Store on June 1, 1994.

Dated this 8th day of June, 1994.

/s/ Richard F. Carman
RICHARD F. CARMAN

Subscribed and sworn to before me this 8th day of June, 1994.

/s/ Illegible
Notary Public in and for the
State of Washington,
residing in Tacoma
Commission expires 5/1/95

SUPERIOR COURT OF THE STATE WASHINGTON
FOR PIERCE COUNTY

STATE OF WASHINGTON; DEPARTMENT OF COMMUNITY DEVELOPMENT; and THE CITY OF PUYALLUP, Plaintiffs, vs. EDWARD COMENOUT, JR.; ROBERT COMENOUT, SR. and JOHN AND JANE DOES 1-9 INCLUSIVE, Defendants.	No. 92-2-06381-1 AFFIDAVIT OF RICHARD F. CARMAN

STATE OF WASHINGTON)
) ss.
COUNTY OF PIERCE)

RICHARD F. CARMAN, being first duly sworn on oath, deposes and says:

1. I am a Fire Marshal for the City of Puyallup. My duties include the investigation of fires of suspicious origin.

2. On May 25, 1993 at approximately 9:30 p.m., I responded to a request to investigate the cause of a fire in a tree in the front yard of 405 10th Avenue N.E., Puyallup.

3. As part of my investigation I interviewed a juvenile suspect. The thirteen-year-old male stated that he

had gone to the Indian Country Store with a friend between 4:30 and 5:00 p.m. on May 25, 1993. The youth stated that he had asked for a package of fireworks which contained numerous bottle rockets, firecrackers and other assorted fireworks. The youth stated that he was waited on in the Indian Country Store by an individual whose only comment was, "Will that be all?"

4. After making the purchase the juvenile stated that he returned home and later that evening ignited and discharged all of the firecrackers contained in the package. The juvenile further stated that shortly before 9:30 p.m. on May 25, 1993, he ignited a sky rocket which skipped along the ground and ignited the tree in the yard at 405 10th Avenue N.E.

5. As part of my investigation, I next contacted and interviewed the friend identified by the juvenile suspect. The second individual was a sixth grade student who confirmed that he had accompanied the juvenile suspect to the Indian Country Store at 9th Street and River Road N.W. where the subject fireworks were purchased.

Dated this 21st day of June, 1993.

/s/ Richard F. Carman
RICHARD F. CARMAN

SUBSCRIBED and sworn to before me this 21st day of June, 1993.

/s/ Illegible
NOTARY PUBLIC in and for
the State of Washington
residing at Puyallup.
Commission expires
May 1, 1995

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR PIERCE COUNTY

THE STATE OF WASHINGTON, DEPARTMENT OF COMMUNITY DEVELOPMENT, and THE CITY OF PUYALLUP, a municipal corporation, Plaintiffs, v. EDWARD COMENOUT JR., AND JOHN AND JANE DOES, 1-10, INCLUSIVE, Defendants.	92-206381-1 ORDER RE CONTEMPT AGAINST EDWARD EDWARD COMENOUT, JR. Next Hearing Date: Clerk's Action Required

THIS MATTER having come on regularly for hearing before the above-entitled Court upon the Motion and Affidavit of Plaintiff, City of Puyallup, by and through Robin Jenkinson, City Attorney for Puyallup, for an Order to Show Cause Re Contempt the Court having reviewed the records and files herein, heard the oral argument of counsel, and being fully advised in the premises, now therefore, the Court finds:

I. FINDINGS

THIS COURT FINDS:

1.1 COMPLIANCE WITH COURT ORDER.

Defendant Edward Comenout, Jr. failed to comply with a lawful order of the Court dated June 23, 1993.

1.2 NATURE OF ORDER.

The order is related to compliance with ch. 70.77, "State Fireworks Law", and Puyallup Municipal Code Chapter 16.20, "Fireworks".

1.3 HOW THE ORDER WAS VIOLATED.

This order was violated by the Defendant's engaging in acts in violation of ch. 70.77 RCW, "State Fireworks Law", and ch. 16.20 of the Puyallup Municipal Code, "Fireworks", in Defendant's commercial activities with respect to special and fireworks on the subject property.

1.4 PAST ABILITY TO COMPLY WITH ORDER.

Defendant is one of the equitable owners of the subject property and the one of the owners of the business known as the Indian Country Store. Defendant had the ability to comply with the order, but did not do so.

1.5 PRESENT ABILITY AND WILLINGNESS TO COMPLY WITH ORDER.

Defendant is in control of the premises and business and therefore has the ability to comply.

II. ORDER AND JUDGMENT

IT IS HEREBY ORDERED:

2.1 Defendant Edward Comenout, Jr. is guilty of contempt for failing to comply with this Court's order of June 23, 1993.

2.2 SANCTIONS.

Sanctions are reserved on the condition of compliance with the provisions of paragraph 2.3 below.

2.3 CONDITIONS FOR PURGING THE CONTEMPT.

The contemnor may purge the contempt as follows:
He may purge the contempt by compliance with order of June 23, 1993 beginning July 1, 1994.

2.4 REVIEW DATE

Defendant Edward Comenout, Jr. shall return to this Court and the Court shall review this matter on 7/29, 1994, at 11:00 a.m. in Room 217A.

OTHER: FURTHER SERIES OF REVIEWS SHALL BE SET CONTINUALLY AS DEEMED NECESSARY TO COERCE COMPLIANCE.

OTHER: YOUR FAILURE TO APPEAR AS SET FORTH AT THE TIME, DATE AND PLACE OF A REVIEW WILL CAUSE THE COURT TO ISSUE A BENCH WARRANT FOR YOUR APPREHENSION AND CONFINEMENT IN JAIL UNTIL SUCH TIME AS THE MATTER CAN BE HEARD.

DONE IN OPEN COURT this 1st day of July, 1994.

/s/ J. Kelley Arnold
THE HONORABLE
J. KELLEY ARNOLD
Judge of the Superior Court

Presented by:

CITY OF PUYALLUP

/s/ Robin Jenkinson
Robin Jenkinson, City Attorney
WSBA No. 10853
(206) 841-5525
Attorney for Plaintiff City of Puyallup

Approved for entry:
Notice of presentation waived:

_____

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UNITED STATES GOVERNMENT

memorandum

Portland Area Director
Branch of Real Estate Services

Review and Response – Jurisdiction of Fireworks Sale on Off-Reservation Restricted Fee Property

Office of the Regional Solicitor
Attention: Colleen A. Kelley

> Mr. Robert R. Comenout, Sr., whose mother and brother own the property involved herein, has requested assistance from the Bureau of Indian Affairs regarding the jurisdiction of the City of Puyallup and the State of Washington, as to the control of the sale of fireworks on purchased restricted fee land. Various activities on the property by Mr. Edward Comenout, Jr., owner of an undivided 1/2 interest in the purchased property, and/or his brother, have been frequently at odds with the City of Puyallup, Pierce county, and the State of Washington as to jurisdiction and enforcement of those certain endeavors, and jurisdictional questions are apparently anticipated through the sale of fireworks again as we approach July 4th.

The subject parcel, also known as 908 River Road, Puyallup, WA, was purchased by Edward Comenout, a member of the Quinault Tribe, utilizing funds verified as trust funds by the Superintendent, Taholah Indian Agency, (and which action indicates the authorization to acquire title in a restricted status), on September 13, 1926. The property is within the City of Puyallup and outside of the boundaries of the Puyallup Reservation.

In *State of Washington v. Edward Comenout, Jr.* Superior Court of the State of Washington for Pierce County, No. 92 2 06381, June 30, 1992, Memorandum of Points and Authorities in Support of Motion for Temporary Restraining Order, the State of Washington stated that the property at issue has been the subject to frequent previous litigation in state and federal court, *Comenout v. Washington.* Although the property is "held in trust by the United States", state jurisdiction has previously been established. Distinguishing this property from land within reservations, the United States District Court has ruled that the State of Washington has jurisdiction to enforce state laws as to activities conducted on this parcel. *Matheson* [sic] *v. Kinnear,* 393 F. Suppl. 1025, 1027-29 (W.D. Wash. 1975). The State goes on to distinguish between "common" and "special" fireworks which are permitted pursuant to state Fireworks Law and codified in RCW 70.77, both of which were apparently being sold by Mr. Comenout in 1992. There are restrictions (to protect the publics' health, safety, and property) against the sale to the public on certain "common" fireworks, and all "special" fireworks are sold only for exhibition or display. Mr. Comenout has not secured licenses (from anyone) for the sale of either types of fireworks and has previously argued that the State, County, and City lack jurisdiction over the premises. It appears that Mr. Comenout has attempted to utilize the question of jurisdiction to his advantage and convenience at times.

In a response to a Congressional inquiry in 1984, regarding a Notice of Hearing by the City of Puyallup as to requirements for connecting to sanitary sewers, the Portland Area Office advised the Central Office that 25 CFR

1.4(a) provides that the laws, ordinances, codes, regulations or rules of a state or subdivision, which control the use of development of land, shall not be applicable to Indian trust or restricted land. However, Department regulations provide that the Secretary of the Interior or his authorized representative may, in specific cases or in specific geographic areas, adopt or make applicable to Indian lands all or any part of such laws, ordinances, codes, regulations, or rules as he shall determine to be in the best interest of the Indian owner or owners. No action to address or adopt such matters on this property has been made by the Secretary. Central Office was advised that the Comenouts should be encouraged to seek legal counsel to represent them in hearings with the City of Puyallup if they (Comenouts) did not feel they would derive any benefits from such city services.

Central Office basically provided the same response to Mr. Robert Comenout, Sr., on September 12, 1984. However, Central Office did state that the sanitary sewer system is an environmental matter under the jurisdiction of the Indian Health Service, and a copy of the inquiry was forwarded to the Indian Health Service for an investigation of the health safeguards and the sewer problem, and requested to respond directly to Mr. Comenout.

The reference to the utilization of trust funds is mentioned hereinabove because the deed cites no statutory authority for the acquisition. However, the Superintendent's Certificate provides as follows: " . . . do hereby certify that the consideration for the within described *real property is money held in trust by the UNITED STATES OF AMERICA for the benefit of the grantee, said real property being purchased for a home.*" It would appear that while the

Bureau of Indian Affairs has dealt with the use and status of this property based on specific issues that arose, that the consideration for the expenditure of trust funds was justified for a single purpose, namely, a home and for whatever constitutes a "home". It would also appear that a business or other use for whatever purpose, for other than a home would be contrary to the consideration extended in the "approval" of the utilization of the funds in the acquisition by the United States for Edward Comenout in 1926.

Pursuant to a determination that Anna Comenout Harris and Edward Comenout were found to be fully competent and capable of managing their own affairs, an Order Removing Restrictions on a portion of the subject property was granted by the Acting Commissioner, in 1950-51, The Order contains a notation as follows: "TAX EXEMPT: The entire tract originally was .38 acre and after they sold .22 acre, it left them .16 acre." The remaining portion, held in a restricted status (which includes an easement for a highway) is a pie-shaped parcel containing 1.78 acres. The title is currently vested in Edward Comenout, Jr., and Anna Jack Comenout as to an undivided 1/2 interest each, subject to restrictions against encumbrance and alienation. However, pursuant to Probate No. IP SA 314N 91, dated March 18, 1993, Anna Jack Comenout's heirs were determined to be as follows:

HEIR	RELATION	INTEREST
Edward Comenout, Jr.	Son	3/27
Robert Comenout	Son	3/27
Dorothy Harris Steward	Daughter	3/27
Donald Harris	Son	3/27
Diane Harris	Daughter	3/27
Jack Harris	Son	3/27
James Harris	Son	3/27
Donald Harris Estate	Son	3/27
Carol Ann Harris	Granddaughter	1/27
Fluornoy Harris	Grandson	1/27
Vernon Harris	Grandson	1/27

The continued use of the premises by Edward and/or Robert Comenout, to the exclusion of the other heirs will surely be another issue involving the subject property. This situation, however, could also provide a solution as to the use, compliance, enforcement, etc., if a leasehold emanates among the ownership. That is, unless the question we pose as to restrictive use for a home is supportable by your review, findings, etc.

We feel and suggest that the authorization to expend trust funds in 1976 to purchase the parcel, subject to restrictions against encumbrance and alienation, was also restrictive as to use, particularly since this parcel was off-reservation and some distance from the individual's Tribe and reservation. (We suggest that this approach was consistent with BIA "policy" regarding such acquisitions during this period.)

Should you have any questions or require additional information regarding this matter, call Jim Wolf at 231-6714.